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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 634

C. W. BRENNAN, *Petitioner,*

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's Brief raises the novel contention that the Petroleum Waiver (R. 145, 149) executed by the original homesteader was done so by him "on the basis of . . . [Respondent's presently urged administrative] construction" of the term "oil" to include oil shale (Res. Br. p. 6). This is not so. No such understanding can be attributed to the homesteader

here. The Petroleum Waiver was signed by the homesteader in 1916; it did not mention oil shale (R. 149). The Department did not publish any decisions relating to oil shale until 1920.[1] Its first reported decision construing a reservation of "oil" pursuant to the 1914 Act[2] to include oil shale did not come until 1927.[3]

Respondent's Brief further attempts to leave this Court with an impression of uniform agency action by suggesting that its now urged interpretation of the term "oil" is a "consistent construction . . . initiated 50 years ago" (Res. Br. p. 6). This, too, is misleading. Inconsistency, not uniformity, characterize the positions adopted by the Department over the years.

A contrary position to that now asserted was taken by the Department in *State of Utah* (1964) 71 I.D. 392. There (in an effort to retain for the United States producing oil and gas wells located on mineral lands selected by the State of Utah for State school lands) the Department distinguished between oil and oil shale subject to reservation pursuant to the 1914 Act as follows:

> "It would appear to follow that, if the base land is mineral land and the selected land is both valuable *for oil shale and valuable for oil or gas* and

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[1] See *Instruction* (May 10, 1920) 47 L.D. 548.

[2] Act of July 17, 1914, 38 Stat. 509 (30 U.S.C. 121-123).

[3] See e.g. *Smallhorn Oil Shale Refining Company et al.* (1927) 52 L.D. 329; *James W. Bell* (1927) 52 L.D. 197. These being the only reported cases Petitioner can find holding that a reservation of "oil" in a patent made pursuant to the 1914 Act included oil shale. While other Department cases have held that the 1914 Act applied to oil shale lands, these usually involved cases where oil shale was specifically reserved in the patent. See *e.g. Union Oil Co. of California* (1953) 61 I.D. 106.

> is situated within the known geologic structure of a producing oil or gas field or included in a producible oil and gas lease, *the State may obtain the selected land, including the oil shale deposits, upon consenting to a reservation to the United States under the 1914 Act of the oil and gas* in the selected land. . We so conclude". (71 I.D. at 403-404) (Emphasis supplied).

Nor can it seriously be argued that the Department customarily regarded a reservation of "oil" to include oil shale. To the contrary, the Department specifically reserved *both* oil *and* oil shale in over 80 per cent of the patents which it issued over the years for the Colorado oil shale lands (R. 206-207).[4]

Numerous other Departmental decisions similarly distinguish between oil and oil shale, holding the former does not include the latter. See, *e.g., Assessment Work on Oil-Shale Claims* (1928) 52 L.D. 333 (holding that the term "oil lands" does not embrace oil shale lands); *Ralph T. Richards* (1952) 52 L.D. 336 (construing the term "oil" used in the Act of June 25, 1910 to exclude the various solid hydrocarbon minerals from which oils could be manufactured); and *Union Oil Company of California, Ramon P. Colvert,* Gower Fed. Ser. BLM 1957-87, aff'd 65 I.D. 245 (holding that oil and oil shale are not the same under the various mineral laws of the United States).

If any uniformity can be gleaned from the Department's conduct over the years, it is one of construing

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[4] Presumably the Department was cognizant of this Court's repeated rulings defining "oil" as a liquid hydrocarbon existing naturally in the earth—and not a solid from which oils can be manufactured. (See cases collected at pp. 14-15 of the Petition).

the term "oil" in whatever context which appeared at the time to enhance the property interests of the United States Government. Certiorari should be granted.

Respectfully submitted,

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